IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. GREGORY RUSHING, Petitioner.	2 CA-CR 2007-0316-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR11982

Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

Gregory Rushing — Yuma
In Propria Persona

B R A M M E R, Judge.

¶1 Petitioner Gregory Rushing was convicted after a jury trial in 1986 of aggravated assault, misdemeanor assault, burglary, and theft. After the jury found him guilty, Rushing admitted having committed a prior felony offense. The trial court then sentenced Rushing to the following concurrent sentences: life in prison for aggravated assault without the possibility of parole for twenty-five years; aggravated fifteen- and three-year terms of imprisonment for burglary and theft; and a six-month term of imprisonment for misdemeanor assault. At the sentencing hearing, the trial court found that Rushing had

committed the instant offenses while he was on probation for two separate felony convictions and ordered all of the sentences to be served consecutively with the sentences imposed for those convictions. On appeal in this case, our supreme court affirmed the assault and burglary convictions but modified the felony theft conviction to reflect a conviction for misdemeanor theft and remanded the case for resentencing on that count. *State v. Rushing*, 156 Ariz. 1, 5, 749 P.2d 910, 914 (1988).

¶2 In this petition for review, Rushing challenges the trial court's order denying relief on claims he raised in two pro se petitions for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. He argues that he was entitled to relief on his claims that there was insufficient evidence to prove his guilt, not only at the time of trial, but in light of the results from deoxyribonucleic acid (DNA) tests conducted as part of the post-conviction proceeding, and that trial, appellate, and Rule 32 counsel were ineffective. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶3 The procedural history of this post-conviction proceeding is, to say the least, protracted. Rushing's convictions arose from a 1985 incident in which he broke into the home of an elderly woman and beat her and her sister, "alternat[ing] between the women, abusing one until she lost consciousness and then turning to attack the other," after which Rushing fled on foot with the purse of one of the women. *Rushing*, 156 Ariz. at 2, 749 P.2d at 911. In December 2000, attorney John Schaus was appointed to represent Rushing in the post-conviction relief proceeding. In January 2001, Rushing filed a pro se petition, and

Schaus requested additional time in which to file a supplemental petition. Shortly thereafter, at Rushing's request, Schaus was permitted to withdraw as counsel, and in March 2001 attorney Michael Villarreal was appointed to represent Rushing.

¶4 Over the next four years, from March 2001 until March 2005, Villarreal requested, and the trial court granted, numerous extensions of time in which to file a Rule 32 petition on Rushing's behalf. In March 2005, Villarreal notified the court that he would "not be supplementing or amending the [January 2001] Rule 32 petition" and that he was "unable to identify any issues upon which to base a claim for [post-conviction] relief." Villarreal requested that he be permitted to withdraw as counsel and that the court grant Rushing an extension in which to file a pro se supplemental petition. In May 2005, before the trial court had granted Villarreal's motion to withdraw, Rushing filed a second pro se petition for post-conviction relief. Understandably, the state filed a motion for clarification in June 2005, inquiring whether Rushing was proceeding without counsel and asking which of the two Rule 32 petitions the state should respond to and by what date. The trial court permitted Villarreal to withdraw in July 2005 and, in August 2005, appointed yet another attorney to represent Rushing. The court gave Rushing's new attorney, Lynn Hamilton, a sixty-day extension in which to supplement Rushing's pro se petitions.

¶5 Over the next two years, Hamilton petitioned the trial court for permission, which the court granted, to submit various items for DNA testing, which had not been available at the time of trial. Hamilton made these requests despite the fact that the evidence from the victim's rape kit, according to Hamilton, had been stored in an un-air-conditioned vault at the Pinal County Courthouse for the previous twenty years. Hamilton also

requested permission to have an investigator pursue potential leads regarding alibi witnesses, which the trial court also granted. As Hamilton explained in a report to the trial court, even though Rushing had been acquitted of the rape charge, because the evidence suggested that the same individual had committed all of the offenses, eliminating Rushing as a rape suspect could have proved his overall innocence.

¶6 In August 2007, Hamilton filed a "Report to Court on Colorable Rule 32 Claims," informing the trial court that she had found no colorable claims or supporting evidence to present in a Rule 32 petition. Hamilton summarized the primary claims Rushing had raised in his pro se petitions—that there was insufficient evidence of his guilt, an argument he claimed was of such "constitutional magnitude" he could not have waived it, and that all of his previous attorneys had been ineffective. In September 2007, the trial court noted it had reviewed Hamilton's report stating that she had been unable to find a colorable claim and then summarily denied "the Relief requested in Defendant's Rule 32 Petition."[1]

¶7 In her report, Hamilton explained why, based on the results of the DNA tests, the investigator's interviews, and the absence of any record from his now-deceased trial attorney, Rushing's claims had no merit. The DNA test results, which compared evidence taken from the victim to Rushing's DNA, showed that Rushing could not be "excluded as a potential source of the minor types found in the sperm fraction of the cervical aspirate" obtained from the victim. Rushing nonetheless claims on review that the DNA evidence

[1]Based on the record before us, we can infer that the trial court treated Rushing's January 2001 and May 2005 petitions as one.

supports his argument that there was insufficient evidence of his guilt. However, the record and the results of the DNA tests simply do not support his claim. We note, moreover, that our supreme court found there was "[a]bundant" evidence tying Rushing to the crimes. *Rushing*, 156 Ariz. at 2, 749 P.2d at 911.

¶8 In her report to the court, Hamilton also addressed Rushing's claim that trial counsel had been ineffective by failing to contact and interview alibi witnesses. Hamilton explained that, not only is trial counsel now deceased, but according to former Judge April Elliott, who took over trial counsel's practice after his death, no files or records from Rushing's case remain. Hamilton attached to her report copies of interviews with the potential alibi witnesses, showing that their testimony would not have been helpful and that Rushing had not been prejudiced by trial counsel's conduct. Stating a colorable claim of ineffective assistance of counsel requires a showing both that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88, 691-92 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). In addition, although Hamilton did not specifically address Rushing's claims that appellate and Rule 32 counsel had been ineffective, because his claims against those attorneys were based on his belief that they should have challenged trial counsel's failure to investigate the alibi witnesses, a claim the trial court found to be without merit, his claims against appellate and Rule 32 counsel were likewise without merit. Moreover, although Rushing raised the claim of ineffective assistance of counsel against Villarreal in a pro se petition, he could not properly raise such a claim at that time, in light of the fact that Villarreal still represented

him. *See State v. Bennett*, 213 Ariz. 562, ¶ 14, 146 P.3d 63, 67 (2006) (improper for appellate counsel to argue own ineffectiveness or to objectively review own performance).

¶9 In the absence of a colorable claim meriting post-conviction relief, the trial court did not abuse its discretion by dismissing Rushing's petitions. We note, in addition, that Rushing was not only permitted to file two pro se petitions for post-conviction relief, but he also received the assistance of three attorneys during the post-conviction proceedings, none of whom were able to find a colorable claim to raise on his behalf and one who persuaded the court to permit and fund extensive investigation and DNA testing in an effort to find such a claim. *See State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035, 1050 (1996) (permitting defendant to "endlessly" raise previously raised claims would lead to "a never-ending tunnel of PCRs"). Therefore, although we grant the petition for review, we deny relief.

_____
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
PETER J. ECKERSTROM, Judge